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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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SEP 30 2014

SC Court of Appeals

September 30, 2014

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Tyrel R. Collins
Appellate Case No. 2014-000216

Dear Ms. Kitchings:

The initial brief of appellant and designation of matter in the above case is due to be served and filed on October 2, 2014. However, we have discovered that we need an additional transcript. Mr. Collins' case was called before the Honorable J.C. Nicholson on September 9, 2013. At that time, Judge Nicholson heard several pre-trial motions. During the opening statements, Judge Nicholson granted the state's motion for a mistrial. Mr. Collins was tried in January of 2014 before the Honorable Roger Young. When he was convicted and filed a notice of appeal, our office took over representation. Based upon the information we received, we ordered the transcript from the January 6-9, 2014 trial. I have received that transcript and reviewed it. Upon review of the transcript, I discovered the prior trial. I also discovered that portions of the prior trial had been incorporated into the record. For example, on page 8, defense counsel states that in the previous trial, there was a Neil v. Biggers hearing and a hearing to suppress items recovered pursuant to a search warrant. The record specifically incorporates portions of the previous trial transcript. One of the motions is that the granting of the mistrial was improper and double jeopardy bars the second trial. Additionally, it appears from the transcript that defense counsel had a transcript (or at least portions of it) at the time of the trial. We have attempted to obtain this transcript from trial counsel, but have been unsuccessful so far.

We will continue to see the transcript from trial counsel. If we are unable to obtain the transcript from counsel by Friday, October 3, 2014, we will order it from the court reporter. We will keep the Court informed of the status of the matter. In light of my need of the transcript of the prior trial and opportunity to review the transcript in order to prepare the brief, I am asking this Court to hold the matter in abeyance pending receipt of the transcript. I am also asking for ample time to review the transcript and prepare the brief.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Susan B. Hackett". The signature is written in a cursive style with a large, prominent initial "S".

Susan B. Hackett
Appellate Defender

SBH/

Enclosures: Pages 8, 9, 66-69

cc: Donald J. Zelenka, Esquire
Tyrel Collins, #338147

1 THE COURT: Jason, you've got double jeopardy
2 motion; and what else, a motion to suppress a gunshot
3 residue? Is that ones you take up now or is that something
4 we need to have an expert for later?

5 MR. KING: I believe we will have to wait later in
6 the week when the expert is here to clarify those issues.

7 THE COURT: All right. What else did you have?

8 MR. KING: Your Honor, I have a search warrant
9 motion. I told the solicitor -- I had originally filed Neil
10 vs. Biggers motion that we heard in the previous trial. I'm
11 fine with not rehashing all of that. I sent a copy of the
12 transcript from the previous trial.

13 THE COURT: I read them.

14 MR. KING: However you want to do it, incorporate
15 that.

16 THE COURT: If you are willing to say that the
17 testimony is what it is and you don't need to question
18 anybody any further, then we can do one of two things. I
19 can either adopt Judge Nicholson's rulings, or I can allow
20 you to argue based on those. So I'm giving you the option.

21 MR. KING: Yes, Your Honor.

22 THE COURT: As long as we don't need to bring the
23 witnesses back in to do it, well, that saves some time.

24 MR. KING: I have no better arguments now than I
25 did then. If Your Honor wants to just adopt Judge

1 Nicholson's rulings, that's fine with me.

2 THE COURT: Okay. Well, I read them. I don't
3 disagree with Judge Nicholson's rulings. I would give you
4 the opportunity if you wanted to make further arguments you
5 could. But if you think it would be a fruitless endeavor,
6 then I will just adopt the testimony and his rulings. So
7 you just need to then make your double jeopardy motion
8 argument.

9 MR. KING: Yes, Your Honor. There's one more
10 related to the search warrant. I'm fine adopting Judge
11 Nicholson's rulings on the probable cause part of it.

12 THE COURT: Okay.

13 MR. KING: But I have -- I've narrowed it down to
14 one issue, which is whether or not the police had probable
15 cause to search this particular residence, or that reason --
16 or probable cause that the items they were looking for would
17 be found at this particular residence. I think that would
18 be -- that may require some brief testimony, but I don't
19 think that will be drawn out.

20 THE COURT: All right. Is that person, that
21 officer or whoever you need, available this afternoon after
22 lunch to do that?

23 MR. KING: It will be Osborne, maybe it will be.

24 MS. LINDER: I believe he wanted Osborne, and he's
25 in my office right now. He's going to come over for jury

1 So I have some concern. I think it goes beyond
2 what just you were saying, is what she's potentially able to
3 talk about.

4 THE COURT: All right. In that case then, I will
5 have her sequestered as well.

6 MR. KING: I do have Investigator Lee Ginn who is
7 not here at the moment, but will he be allowed?

8 THE COURT: That's fine.

9 All right. All right. What sort of motions do we
10 need to take up now?

11 MR. KING: I need to make sure that none of the
12 witnesses are in here right now, Judge.

13 THE COURT: All right.

14 Do you have any motions that you wanted to take up?

15 MR. KING: Yes, Your Honor. I think we can start
16 with the double jeopardy motion.

17 THE COURT: All right. Go ahead.

18 MR. KING: We've already discussed, I guess, some
19 of the argument would go there. I provided the transcript.
20 Your Honor was able to read it, where the State gave an
21 opening statement, and I began an opening statement, and
22 told the jury that they talked about the East Side is a
23 high-crime area. And I told the jury that Solomon Chisolm,
24 the victim in the crime, was legendary in that area for
25 being a killer. And the State objected. And a mistrial was

1 granted.

2 I just filed a motion that that mistrial was
3 improperly granted and not dictated by manifest necessity.
4 I think a curative instruction could have been given. What
5 I said wasn't evidence. You know, I know the State has a
6 right to a fair trial, but here's a defendant who has the
7 rights of the trial, the constitutional rights and the most
8 protections.

9 It was the State who made the motion, but I don't
10 believe that it rose to the level of mistrial. We'd ask, I
11 guess, to dismiss the indictments as being barred by double
12 jeopardy.

13 THE COURT: Who would like to argue this for the
14 State?

15 MR. VOIGT: Your Honor, the defense argues State v.
16 Prince. That's the first of the modern case adopting
17 mistrial language in South Carolina. State vs. Prince was a
18 several-day trial. Jury was out for a long time. After
19 about eight hours, the judge indicated that he was going to
20 declare a mistrial, that it was hung. The jury came back
21 and asked to hear an additional four hours of testimony. At
22 that point, the Court declared it a hung jury, declared a
23 mistrial.

24 And what the defense attorney did in that case is
25 something that does not appear in a transcript that was

1 provided to you. He leaned over to the microphone and said
2 two words: I object. And that's how the Court of Appeals
3 knew that that was a mistrial granted over the defense
4 objection.

5 Mr. King has provided you with a transcript of what
6 was probably the most uncomfortable 15 minutes of his
7 professional career. The transcript really doesn't -- it's
8 interesting to read something that happened very recently
9 and that I have memories of. And really doesn't convey, I
10 think, the kind of emotions that was in the room at the
11 time. I think there were a lot of angry people at the time,
12 myself being one of them.

13 My initial argument to the Court was what Mr. King
14 had done in trying to introduce reputation of the victim in
15 the first sentence of his opening statement, I was arguing
16 that it was an intentional act. And the entire transcript
17 and the colloquy between Judge Nicholson and Mr. King really
18 involves whether or not that was an intentional act or not.
19 And we get into a long discussion, Mr. King and the judge
20 do, about how evidence is introduced and that sort of thing.

21 But at no point does Mr. King say the words, I
22 object to the mistrial. And it's simple to do. And it
23 would -- I mean, he had the opportunity to speak. It was
24 not like he was being harangued, and was not being hemmed
25 in. He had the ability to make the record if he wanted to,

1 and he did not.

2 The fact is that after that transcript ends -- you
3 know, that transcript ends frankly with a contempt threat
4 towards Mr. King. It didn't end that way. Over the course
5 of probably an hour, we all walked ourselves back to our
6 respective positions and agreed to fight another day.

7 I would believe -- I would argue, Judge, that the
8 actions that the defense took that day were an acquiescence
9 to the mistrial.

10 THE COURT: Well, the transcript that I read didn't
11 seem to any way indicate that he thought -- I didn't sense
12 that Mr. King joined in the motion for a mistrial. He
13 didn't -- in fact, he made arguments that he thought he
14 could say what he said.

15 MR. VOIGT: But he didn't object to the mistrial
16 being granted.

17 THE COURT: Isn't that, in essence, an objection,
18 arguing against it?

19 MR. VOIGT: I think that our -- I've done this from
20 both sides. And I've taught myself to protect the record.
21 And objecting on the record, especially in mistrials, is how
22 we get the ball rolling. It's how we keep the record intact
23 for our clients. It's not hard to do. It's not a magic
24 formula. But they are magic words. And just -- like I
25 said, the essence of that transcript argument is not an